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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

JOHN L. McLUCAS, SECRETARY OF THE AIR FORCE, ET AL., APPELLANTS

v.

RAYMOND G. DECHAMPLAIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 15–28) is not reported.

JURISDICTION

The preliminary injunction of the district court (App. B, *infra*, pp. 29–30), was entered November 13, 1973. A notice of appeal to this Court (App. C, *infra*, p. 31), was filed on December 12, 1973. On February 12, 1974, the Chief Justice extended the time for docketing the appeal to March 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 since a court

of the United States has entered an interlocutory order holding unconstitutional an act of Congress, Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, in a civil action to which an officer of the United States is a party.

STATUTE INVOLVED

Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTIONS PRESENTED

1. Whether the district court properly enjoined a pending military court-martial.

2. Whether the third clause of Article 134 of the U.C.M.J., 10 U.S.C. 934, which confers court-martial jurisdiction over "crimes and offenses not capital," is unconstitutionally vague.

3. Whether the district court properly invalidated restrictions on access to classified documents and their use placed upon the defendant's civilian counsel.

STATEMENT

Appellee Air Force Master Sergeant DeChamplain was charged before a court-martial in 1971 with copy-

ing and attempting to deliver classified military information to a Russian government agent while stationed in Bangkok, Thailand, in June and July, 1971 (App. A, p. 15). The classification of the information varied from "confidential" to "top secret."[1]

In November 1971, DeChamplain was tried by general court-martial and convicted of three offenses: (1) violating Article 81 of the Uniform Code of Military Justice by conspiring to communicate classified information to an agent of a foreign government in violation of Article 134 and 50 U.S.C. 783(b); (2) violating Article 92 of the Code by failing to obey an Air Force regulation requiring contacts with foreign agents to be reported; and (3) violating Article 134 of the Code by copying classified documents in violation of 18 U.S.C. 793(b), and by attempting to deliver such copies to an unauthorized person in violation of 18 U.S.C. 793(d). DeChamplain was sentenced to 15 years' confinement, reduction to the lowest rank, total forfeiture of pay, and a dishonorable discharge.

The Air Force Court of Military Review reversed this conviction and remanded the case in 1972, on the ground that DeChamplain's confession, which had been admitted into evidence, had been involuntary. *United States* v. *DeChamplain*, ACM 21034, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.

The Air Force then prepared to retry DeChamplain before a second general court-martial upon substantially the same charges. DeChamplain filed with the military judge a number of motions to dismiss the

[1] *United States* v. *DeChamplain*, ACM 21034, 46 C.M.R. 784, affirmed, 22 U.S.C.M.A. 150, 46 C.M.R. 150.

charges against him on various grounds, including the alleged unconstitutionality of Article 134 and a claimed denial of access to classified documents relevant to his prosecution. These motions were denied. DeChamplain also filed three successive petitions for extraordinary relief in the Court of Military Appeals, all of which were also denied. *DeChamplain* v. *United States*, 22 U.S.C.M.A. 211, 46 C.M.R. 211, and No. 73–26, 46 C.M.R. 1329; *DeChamplain* v. *McLucas*, 22 U.S.C.M.A. 462; 47 C.M.R. 552. DeChamplain's second court-martial was scheduled to begin on November 15, 1973, at Richards-Gebaur Air Force Base, Missouri (App. A, p. 15).[2]

On October 3, 1973, DeChamplain brought suit in the District Court for the District of Columbia to enjoin the court-martial. The district court granted a preliminary injunction. The court first held that it could review the merits of DeChamplain's claims while his court-martial is pending (App. A, pp. 19–20). Next, the court held that DeChamplain could not be tried on the two charges under Article 134 because that Article is unconstitutionally vague (App. A, p. 20).

Finally, the court ruled that the restrictions imposed upon the use of classified documents by DeChamplain's civilian defense counsel preclude a fair trial. The Air Force had authorized DeChamplain, his military and civilian counsel, as well as a civilian associate and secretary, to have access to all pertinent

[2] Since his arrest in July 1971 and throughout these proceedings, DeChamplain has been in military confinement (App. A, p. 23).

evidence to be used against DeChamplain including the classified material which DeChamplain is charged with having attempted to deliver to Soviet agents. With respect to fifteen of the classified documents that DeChamplain allegedly attempted to deliver, however, the Air Force decided to drop the charges against DeChamplain rather than to disclose the documents (App. A, p. 25). As these fifteen documents were introduced as evidence at the first court-martial, DeChamplain and his military counsel have had access to them, but they are barred from discussing them with civilian counsel (App. A, p. 22). In addition, with respect to the nine other classified documents which the Air Force intends to use in the second court-martial, it imposed the following restrictions:

> (A) The documents may not be released to civilian counsel; (B) They may see and read the documents only in the presence of one holding the appropriate security clearance; (C) They may not make copies of the documents; (D) No written notes made by them with respect to classified information contained in said documents may be removed from Air Force control; and (E) They will be advised of applicable laws and penalties for unauthorized release of classified information.

The district court invalidated the restrictions and enjoined prosecution of DeChamplain unless "full and unlimited access to all documents relevant and material to" the case is granted to DeChamplain, his civilian counsel, "and such legal associates and assistants, subject to an appropriate protective order, as are

necessary to said counsel's adequate preparation for trial." (App. B, p. 30) Specifically, the court directed that the entire record of the first court-martial be delivered to civilian counsel.[5]

THE QUESTIONS ARE SUBSTANTIAL

1. The present case is one of several recent cases in which district courts have enjoined pending court-martials,[6] and this case is an appropriate vehicle for this Court to review the important question of the authority of the federal courts to do so.

a. The action of the district court is contrary to the well-established doctrine prohibiting federal courts from enjoining prosecutions pending in other jurisdictions except in limited and unusual circumstances. *Younger* v. *Harris*, 401 U.S. 37; *Dombrowski* v. *Pfister*, 380 U.S. 479. Although *Younger* and *Dombrowski* involved injunctions of state prosecutions, the reason

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[5] The district court did not reach two other claims raised in the complaint. One of these challenged the Air Force's refusal to authorize DeChamplain's military counsel to represent DeChamplain in ancillary federal civilian proceedings against the Air Force. (App. A, p. 17). The other challenged possible exclusion of members of the public during the portions of DeChamplain's court-martial in which classified materials are discussed (App. A, pp. 22-23).

[6] *McCahill* v. *Eaton*, 361 F. Supp. 588 (N.D. Fla.); *Meyhan* v. *Laird*, 305 F. Supp. 551 (D. R.I.); *Schroth* v. *Warner*, 353 F. Supp. 1032 (D. Hawaii); *Redmond* v. *Warner*, 355 F. Supp. 812 (D. Hawaii); *Holder* v. *Richardson*, 364 F. Supp. 1207 (D. D.C.), appeal pending, No. 73-2034 (C.A.D.C.); *Cf. Humphill* v. *Moseley*, 443 F. 2d 322 (C.A. 10); *Councilman* v. *Laird*, 481 F. 2d 613 (C.A. 10), certiorari granted, No. 73-662; *Contra*, *Sedivy* v. *Richardson*, 485 F. 2d 1115 (C.A. 3), petition for certiorari pending, No. 73-6030; *Dooley* v. *Plager*, No. 73-1900 (C.A. 4, Feb. 12, 1974).

ing of those decisions has been correctly applied to court-martial proceedings. See, *e.g.*, *Sedivy* v. *Richardson*, 485 F. 2d 1115 (C.A. 3), petition for a writ of certiorari pending, No. 73-6030; *Levy* v. *Corcoran*, 389 F. 2d 929 (C.A.D.C.), certiorari denied, 389 U.S. 960.

This Court's opinion in *Younger* makes clear that the irreparable harm which alone justifies federal court injunction of pending proceedings must be something more than "that incidental to every criminal proceeding brought lawfully and in good faith." 401 U.S. at 49. In the present case there is no suggestion that ~~petitioner's~~ court-martial is being brought in bad faith or for the purposes of harassment, and the fact that ~~petitioner~~ alleges Article 134 to be unconstitutionally vague is not sufficient to justify injunctive relief. *Younger* v. *Harris*, *supra* at 49.

The district court's basis for finding irreparable harm in the present case was that "in the event plaintiff is convicted and is sentenced to a period of confinement, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts" (Pet. App. A, pp. 27–28). This basis is legally insufficient as demonstrated by *Younger*, *supra*. The order below does not, in any event, terminate DeChamplain's present confinement. Article 10 of the Uniform Code of Military Justice, 10 U.S.C. 810, provides for confinement pending courts-martial, and the district court order does not affect his confinement.

Moreover, the prospect of confinement during exhaustion of remedies cannot serve as a basis for find-

ing irreparable harm; otherwise, the rule against injunctions of pending prosecutions would be destroyed since probably most criminal defendants face the prospect of confinement if convicted.

b. The injunction granted by the district court was improper for the further reason that it constitutes an impermissible interference by a civilian court with the military court-martial system. As Judge Leventhal wrote in his concurring opinion in *Levy* v. *Corcoran*, *supra* at 930:

> The lack of equity jurisdiction to issue an injunction * * * inhere[s] in the relationship of the civil courts and military tribunals, a relationship which looks to habeas corpus or kindred remedies as the technique by which the civil courts exercise such limited intervention as may be proper in cases taken before military tribunals.

Pursuant to its power "To make Rules for the Government and Regulation of the land and naval Forces," Art. I, sec. 8, cl. 14, Congress has established special courts for military criminal cases. *Burns* v. *Wilson*, 346 U.S. 137. Civilian courts have no "appellate jurisdiction to supervise the administration of criminal justice in the military," *Noyd* v. *Bond*, 395 U.S. 683, 694. As Judge Leventhal pointed out in *Levy* v. *Corcoran*, *supra*, civilian court review of military proceedings has been limited to *habeas corpus* or kindred review, and then only after "* * * all available remedies within the military court system have been invoked in vain." *Noyd* v. *Bond*, 395 U.S. 683, 696 n.8; *Gusik* v. *Schilder*, 340 U.S. 128.

The district court sought to justify its interruption of the impending court-martial on the ground that DeChamplain's challenge to the constitutionality of Article 134 presented a purely legal question outside the expertise of military courts. As noted earlier, the asserted unconstitutionality of a statute is not a sufficient ground for injunctive relief. As stated in *Levy* v. *Corcoran*, *supra* at 930–931, "* * * petitioner can preserve his constitutional defenses before the general court-martial and in due course can present them to the Court of Military Appeals."

The principles underlying the prohibition on injunctions of pending court-martial proceedings are based on both a proper regard for the integrity of the military court system and the conservation of scarce federal judicial resources. Civilian court intervention prior to military trial and appeal inevitably results in disruption of the court-martial process. Delay occasioned by such piece-meal review makes trial by court-martial more difficult and perhaps impossible. Moreover, such intervention might become unnecessary if the court-martial proceeding were permitted to follow its normal course. Indeed, an acquittal at trial or a reversal at the appellate stage (as occurred in DeChamplain's first court-martial) would obviate the need for any civilian court review.

2. The injunction below was also improper because it rests upon two substantive determinations which are erroneous under the pertinent decisions of this Court.

The district court enjoined DeChamplain's prosecution under Article 134 based upon the lower court rulings in *Secretary of the Navy* v. *Avrech*, No. 72–1713, and *Parker* v. *Levy*, No. 73–206. Aside from the fact that the alleged unconstitutionality of Article 134 does not provide a basis for injunctive relief (see p. 9, *supra*), the Court's holding that the third clause of article 134 prohibiting "crimes and offenses not capital" is unconstitutionally vague is erroneous.

The third clause of Article 134 is in effect an assimilative crimes provision—that is, it confers court-martial jurisdiction over service-connected noncapital federal offenses not otherwise punishable under the Uniform Code of Military Justice. *United States* v. *Frantz*, 2 U.S.C.M.A. 161, 7 C.M.R. 37. See Manual for Courts-Martial ¶ 213e. DeChamplain's challenge to the third clause of Article 134 is similar to the challenge to the Assimilative Crimes Act, 18 U.S.C. 13, rejected in *United States* v. *Sharpnack*, 355 U.S. 286. In sustaining that statute, this Court held: "Whether Congress sets forth the assimilated laws in full or assimilates them by reference, the result is as definite and as ascertainable as the state laws themselves." *United States* v. *Sharpnack*, *supra*, at 293. DeChamplain does not contend that the incorporated statutes that he is accused of violating—18 U.S.C. 793 (b) and (d) and 50 U.S.C. 783(b)—are unduly vague.

Moreover, neither the third clause of Article 134 nor the provisions of the incorporated statutes are unconstitutionally vague as applied to DeChamplain. In *Broadrick* v. *Oklahoma*, 413 U.S. 601, this Court

held that "even if the outermost boundaries" of a statute "may be imprecise, any such uncertainty has little relevance" where the accused's conduct "falls squarely within the 'hard core' of the statute's proscriptions * * *." 413 U.S. at 608. DeChamplain cannot contend that the statutes he is charged with violating do not prohibit attempting to deliver top secret defense documents to the Soviets.

The third clause of Article 134 is simply not vulnerable to a claim based on vagueness. Thus, the district court's holding is erroneous and is unrelated to the issues presented by *Avrech* and *Levy* which involve the constitutionality of other portions of Article 134.

3. Finally, the district court also erred in holding that the restrictions regarding access to and use of the classified materials in issue preclude a fair trial. No evidence is being withheld from DeChamplain or his civilian and military counsel. The restrictions regarding use of the classified materials are a reasonable accommodation of the accused's interests, on the one hand, and the military's legitimate interest in preventing widespread dissemination of the materials, on the other hand. In addition, after the district court's opinion was rendered, the Air Force amended its restrictions to enable two foreign-policy experts selected by DeChamplain to have access to the classified materials. (Pet. App. D, *infra*, pp. 32–33). This amendment removes the basis of DeChamplain's principal challenge to the original restrictions (Pet. App. A, p. 17).

In *United States* v. *Augenblick*, 393 U.S. 348, this Court rejected the claim of a serviceman that his

court-martial conviction was constitutionally defective because he had been denied access to potential evidence in the prosecutor's possession. *Augenblick* held that "apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten * * * that the proceedings is more a spectacle * * * or trial by ordeal * * * than a disciplined contest." 393 U.S. at 356. There is no basis for concluding that the restrictions imposed upon DeChamplain's use of the classified material would have that effect.

Moreover, DeChamplain unsuccessfully challenged the restrictions regarding use of classified materials in his petition for extraordinary relief in the Court of Military Appeals. *DeChamplain v. McLucas*, 22 U.S.C.M.A. 462, 47 C.M.R. 552. Congress has provided that the decisions of military courts shall be "final and

conclusive" and "binding upon all * * * courts * * * of the United States * * *." 10 U.S.C. 876. The decision below, therefore, is essentially an unauthorized appeal from a pre-trial discovery determination of the military courts.

CONCLUSION

For the foregoing reason, probable jurisdiction should be noted.

Respectfully submitted.

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MARCH 1974.

APPENDIX A

United States District Court for the District of Columbia

(Filed November 13, 1973—James F. Davey, Clerk)

RAYMOND G. DECHAMPLAIN, PLAINTIFF

v.

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS

Civil Action No. 1863-73

MEMORANDUM: FINDINGS OF FACT AND CONCLUSIONS OF LAW

The plaintiff, a non commissioned officer in the United States Air Force seeks injunctive relief against the Secretary of the Air Force, the Chief of Staff, Department of the Air Force, the Judge Advocate General of the Air Force and certain officers of the Richards-Gebaur Air Force Base, Missouri. His complaint alleges that he is scheduled for trial on November 15, 1973 by a general court martial convened by the Commanding Officer, 1840th Air Base Wing, on various charges and specifications in violation of the Uniform Code of Military Justice (UCMJ), specifically, Article 81- conspiracy, Article 92—failure to obey a lawful general regulation, Article 134- the so called "general article," 10 U.S.C. §§ 881, 892 and 834. Those charges relate to alleged espionage activities by the plaintiff in the summer of 1971 while stationed in Thailand. A prior conviction

and sentence on the charges were set aside and rehearing authorized by the Air Force Court of Military Review, *United States* v. *DeChamplain*, ACM 210434, 46 CMR (Oct. 5, 1972). That tribunal found that plaintiff's involuntary confession was wrongfully introduced at the trial. The decision of the Court of Military Review was affirmed on appeal, *United States* v. *DeChamplain*, 22 U.S. CMA 150, 44 CMR 150 (Feb. 16, 1973).

During the subsequent pretrial proceedings conducted pursuant to Article 39(a) UCMJ, 10 U.S.C. § 839(a), the presiding military judge rejected various objections made by defense counsel which are central to this litigation:

1. That the Article 134 specifications be dismissed based upon the recent decisions invalidating that provision as unconstitutional. *Avrech* v. *Secretary of the Navy*, 477 F. 2d 1237 (D.C. Cir. 1973); *Levy* v. *Parker*, 478 F. 2d 772 (3rd Cir. 1973); *Hooper* v. *Laird*, 482 F. 2d 784 (D.C. Cir. 1973).

2. That retained civilian defense counsel, Leonard B. Boudin, Esquire, be permitted complete access to certain classified documents for the purposes of copying and discussion with partners, associates as well as outside consulting experts. These documents which comprise the heart of the court martial charges, were allegedly transmitted by DeChamplain to foreign agents.[1] Substantial restrictions have been imposed upon Mr. Boudin's use of these documents. Copies would not be provided; examination could only take

[1] Charges relating to certain classified documents, to which the military had sought absolute non-disclosure, have been dropped. The military had evidently chosen not to prosecute those charges rather risk being forced to disclose the documents on even a limited basis. The issue of access to documents, therefore, relates only to those upon which the Air Force is basing their case.

place in the presence of military authorities; no notes could be taken from the "secured" area; all notes taken would be reviewed by military officials to determine whether or not they must remain in the "secured" area; the classified information could not be viewed by or discussed with anyone except for one associate attorney and one secretary.[2]

3. That the Court martial proceeding be open fully to the public and the press during all phases, including the time when the classified documents are discussed.

The plaintiff then raised these issues in a petition for Extraordinary Relief before the United States Court of Military Appeals. The petition was summarily denied, United States Court of Military Appeals, Misc. Docket 73–46, September 5, 1973. Complaining that these rulings by the military constitute serious deprivations of his constitutional rights to due process and fair trial, plaintiff now requests this Court to intervene in the military judicial process by enjoining the forthcoming court martial unless and until the alleged deficiencies are rectified.

On November 9, 1973 the matter came before the Court on plaintiff's motion for a preliminary injunc-

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[2] Civilian counsel, who is experienced in "espionage" trials, has expressed his desire to consult with and seek the advice of several experts in national security matters. The nature and contents of classified documents are crucial to establishing and defending such charges. See e.g. *Gorin* v. *United States*, 312 U.S. 19 (1941); *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945).

[3] A fourth issue, not raised at the Article 39(a) pretrial hearings, has been introduced into this suit: that DeChamplain's military appointed judge advocate has been improperly refused permission to represent the sergeant in ancillary federal court proceedings. The Court, in reaching its decision, need not and will not rule upon this point, which counsel candidly admitted during oral argument as being tangential to the gravamen of the complaint.

tion and the government's motion to dismiss. As to both motions, the government adopted a central position: that the posture in which the case is presented compels the Court to abstain from interfering with the court martial proceedings since the plaintiff has not exhausted the military remedies available to him through appellate review.

After full briefing and argument the Court concludes that the circumstances here presented are sufficiently compelling to warrant intervention and, in accordance with the Findings of Fact and Conclusions of Law set forth below, hereby preliminarily enjoins prosecution of the pending court martial of the plaintiff.

It is well established, and plaintiff must concede, that generally a serviceman must first exhaust his military remedies before a federal court will interfere with court martial proceedings. *Noyd* v. *Bond*, 395 U.S. 683 (1969); *Sedivy* v. *Richardson*, 3rd Cir. No. 72-2065, decided September 26, 1973; *Levy* v. *Corcoran*, 389 F. 2d 929 (D.C. Cir. 1967). Accordingly, the government contends that plaintiff must first stand trial, which might result in acquittal, and then, if convicted, utilize the military appellate procedure before applying to this Court for relief. This rule is by no means inflexible and exceptions have been acknowledged. In *Noyd* upon which the government heavily relies, Mr. Justice Harlan noted that there may well exist situations which justify a claimant to seek vindication of his rights through the civilian courts without first utilizing the military appellate machinery, particularly when "the complainants raised substantial arguments denying the right of the military to try them at all." 395 U.S. 683, 696 n. 8. See also *Hemphill* v. *Moscley*, 443 F. 2d 322, 323 (10th

Cir. 1971). Although *Noyd* held that the doctrine of exhaustion would control, that decision was at least partially based upon the reluctance to pass upon questions of military law for which the Court felt no expertise.[4]

This concern was also evidenced in the most recent case, *Sedivy* v. *Richardson*, *supra*. There, Sedivy had prevailed upon the district court to enjoin his pending court martial, claiming that the charges against him were not service-related and therefore the military lacked jurisdiction to try him. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). In setting aside the order on grounds of failure to exhaust remedies the Third Circuit observed that the claims raised necessarily involved factual determinations and factors which could have and should have been acted upon in the first instance by the military. However, the court significantly acknowledged that under compelling circumstances the exhaustion requirement could be dispensed with:

> "We perceive the presence of no countervailing circumstances to necessitate a departure from the normal requirement of exhaustion of military remedies before recourse to federal civilian courts." Slip Opinion at 9.

The circumstances surrounding this case are such that unless this Court takes affirmative action Ser-

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[4] "Moreover, if we were to reach the merits of petitioner's claim for relief pending his military appeal we would be obliged to interpret extremely technical provisions of the Uniform Code which have no analogs in civilian jurisprudence and which have not been fully explored by the Court of Military Appeals itself. There seems little reason to blaze a trial on unfamiliar ground when the highest military court stands ready to consider petitioner's argument." 395 U.S. at 696.

[5] *Sedivy* v. *Richardson*, supra, Slip Opinion at 11.

geant DeChamplain will be denied fundamental constitutional guarantees.

The matters raised in this litigation do not necessitate determinations which the military forum is best equipped to make. The issues are purely legal: whether the military has jurisdiction to try plaintiff for violations of a statute which stands unconstitutional under circumstances and conditions which may unduly impede his preparation and presentation of a sound defense. No compelling justifications have been presented which require this Court to defer consideration of these matters to the military.

Article 134

The status of Article 134 is not uncertain at this time—it is unconstitutional.[6] *Avrech* v. *Secretary of the Navy, supra; Levy* v. *Parker, supra; Hooper* v. *Laird, supra; Stolte* v. *Laird*, 353 F. Supp. 1392 (D.D.C. 1972). The military, however, has refused to accept this ruling, and, as evidenced by this suit, persists in prosecuting under the outlawed provision. See *United States* v. *Unrue*, No. 26,552 United States Court of Military Appeals, April 2, 1973, in which the nation's highest military tribunal, relying upon an 1858 Supreme Court decision which upheld Article 134, categorically refused to follow *Avrech*. It simply offends basic notions of fairness to require plaintiff to endure a possible lengthy court martial and further expect that appellate relief be sought in a tribunal which has clearly and summarily rejected the claims asserted. Indeed, at least two federal district courts have enjoined such proceedings based upon Article 134

[6] The Supreme Court has agreed to review this issue. Avrech v. Secretary of the Navy, 72-1713, 42 U.S. LW. 3173, October 9, 1973.

specifications. *McCahill* v. *Eason, et al.*, 73–73 CIV–P, Northern District of Florida, Pensicola Division, Final Order dated June 12, 1973; *Waters* v. *Schlesinger, et al.*, C.A. 3–7766, Northern District of Texas, Dallas Division, Temporary Restraining Order and Order to Show Cause, dated October 11, 1973. In *McCahill*, Chief Judge Arnow specifically found that in view of the *Unrue* ruling "[t]o require the petitioner to exhaust his military remedies would force him to undergo a useless ordeal." This Court finds that reasoning persuasive.

ACCESS TO DOCUMENTS AND CONDUCT OF THE TRIAL

Civilian defense counsel has argued that the severe limitations placed upon him and his staff will so seriously impede his ability to defend the charges as to deny DeChamplain a fair trial as guaranteed by the Sixth and Fourteenth Amendments.

It has been held, and the government has offered no apparent resistance to the fact that a successful federal prosecution for espionage, under 18 U.S.C. § 793, violations of which are incorporated into the Article 134 charges against DeChamplain, must prove that dissemination of the particular information to a foreign power would cause injury to the United States and that the information had not otherwise been made public. See *Gorin* v. *United States*, 312 U.S. 19 (1941); *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945). Clearly then, any vigorous defense of espionage charges requires counsel to be thoroughly familiar with the contents and nature of the documents which are central to the case and the prosecution must accordingly disclose the material to the defense. If, for the sake of maintaining the confidentiality of sensitive documents, it is unwilling to do so, it must be prepared

to forego trial. The government must be put to the choice. It may not bring serious charges against an individual and at the same time withhold crucial evidence from the accused. See *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944), wherein Judge Learned Hand counseled: "[t]he government may choose; either it must leave the transactions in the obscurity from which trial will draw them, or it must expose them." Presumably in observance of that principle, the military has chosen not to introduce into evidence 15 documents produced at plaintiff's first court martial. However, as to nine others, which will comprise the core of the case against plaintiff, the military authorities have afforded Mr. Boudin only limited access. This Court can readily envision these restrictions, which have been earlier delineated, as effectively handcuffing retained civilian counsel. The Air Force has not come forward with any convincing justification, military or otherwise, for the imposition of these limitations.[5] This Court does not mean to imply that the military is powerless to obtain protective orders designed to prevent unwarranted disclosure of sensitive material, but the conditions demanded by the military are clearly excessive and abridge plaintiff's right to a fair trial.[6]

As to the issue of affording plaintiff a public trial, open to spectators and the press, the Court feels that

[5] Military, appointed counsel has been permitted to review these documents but is prohibited from discussing them with the civilian defense team.

[6] The Court notes that in the recent trial of United States of America v. Russo and Ellsberg, No. 9373, United States District Court, Central District of California, Judge Byrne issued a protective order preventing public disclosure of classified matter, but permitted counsel and his staff, including experts and consultants, access to these documents subject to the terms of the protective order.

the matter need not be passed upon at this time. Indeed, the government represented to the Court that the military trial judge has indicated that should the need arise he would invoke his power under the Manual for Courts Martial and restrict the public from attending the proceedings. In view of the fact that the Sixth Amendment right to a public trial is not absolute, injunctive relief as to this point would be inappropriate.

In view of the foregoing the Defendant's Motion To Dismiss is denied.

The Court enters the following Findings of Fact and Conclusions of Law in conjunction with the Plaintiff's Motion for a Preliminary Injunction:

Findings of Fact

1. Plaintiff, Master Sergeant in the United States Air Force, is presently under pre-trial confinement, awaiting court-martial on three charges alleging violations of Articles 92, 134 and 81 (conspiracy to violate Article 134), Uniform Code of Military Justice (herein called UCMJ).

2. Plaintiff was arrested and incarcerated by the Air Force on July 2, 1971, and has been under continual restraint since that date. He originally was tried and convicted on charges alleging violations of Articles 81, 92 and 134, Uniform Code of Military Justice, and was sentenced to dishonorable discharge, confinement at hard labor for fifteen years. The conviction and sentence were reversed on October 5, 1972 by the United States Air Force Court of Military Review (*United States* v. *DeChamplain*, ACM 21034) on the grounds that alleged inculpatory statements of the plaintiff were involuntary obtained and improperly admitted at trial. On February 16, 1973, the United States Court of Military Appeals affirmed the decision

of the Air Force Court of Military Review, 44 CMR 150.

3. On May 25, 1973, the Staff Judge Advocate, defendant Major Thomas, transmitted his Advice to the new Convening Authority, defendant Colonel Lovelace, recommending that the charges against the plaintiff, with certain amendments of the specifications, be referred to a rehearing by a general court-marital.

4. On May 31, 1973, the charges against the plaintiff were served upon him and were referred to a court-martial by defendant Colonel Lovelace. One of the three charges referred to therein alleges violations of Article 134, UCMJ, 10 U.S.C. § 934, and a second charge alleges violations of Article 81 UCMJ, 10 U.S.C. § 881, for conspiracy to violate Article 134.

5. Article 134, has been declared unconstitutional. *Avrech v. Secretary of the Navy*, 477 F. 2d 1237 (D.C. Cir. 1973); *Levy v. Parker*, 478 F. 2d 772, (3rd Cir. 1973); *Hooper v. Laird*, 482 F. 2d 784, (D.C. Cir. 1973)

6. On September 5, 1973, the plaintiff moved before the defendant Colonel Stanley for dismissal of the charges under Article 134. This motion was denied without opinion. Plaintiff also raised the same substantive matter before the United States Court of Military Appeals, in a Petition for Extraordinary Relief. The petition was denied in all respects on September 5, 1973 (Misc. Docket 73–46). The Air Force has refused to withdraw the charges based on Article 134.

7. On April 2, 1973, in the case of *United States v. Unrue*, No. 26,552, the United States Court of Military Appeals ruled in an unpublished order that it would not follow the decision of the Court in *Avrech v. Secretary of the Navy, supra.*

8. On July 5, 1973, plaintiff directly and through his military counsel retained Leonard B. Boudin, Esquire, civilian defense counsel. On July 6, 1973, and repeatedly thereafter plaintiff by counsel verbally and in writing requested of government trial counsel that the entire record of the prior trial, including the charges and the documents upon which petitioner's original conviction was based and upon which the present case is based, be delivered to the plaintiff's civilian defense counsel for examination and study by the latter and by members of his staff and technical consultants. Plaintiff request that a copy of the same record be made available to him personally so that he could study it, take notes, and consult with his counsel for the purposes of preparing his defense.

9. The defendants McLucas and Lovelace declined to make any of the "classified" portions of the *DeChamplain* case file information available to plaintiff's civilian defense counsel from July to September, 1973 and stated that plaintiff's civilian defense counsel would have to be "cleared" by the Air Force and by other agencies of the federal government. The defendant Stanley acquiesced in that position of the Air Force and declined to direct that copies of the entire record of the first trial be given to the plaintiff and to the civilian counsel of his choice.

10. The following restrictions have been imposed by the Air Force:

> (a) With respect to approximately fifteen documents introduced in evidence at plaintiff's first trial, plaintiff's civilian counsel would not be given copies or even access to the said documents or to that part of the trial record relating thereto. The Air Force has advised that it would seek to avoid this problem by not introducing

the said documents into evidence at the new trial.

(b) With respect to nine other documents, the plaintiff's civilian defense counsel would not be allowed to receive copies of them (or the transcript references as to subject), but would be permitted to look at the documents under severe restrictions. He would not be able to examine or retain copies of the documents in his office, but would be required to examine them in the presence of officials holding appropriate security clearances (including military defense counsel), and at a location chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit *all* his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured." Finally, he could not discuss classified information with associates or consultants in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances. Nor could the plaintiff himself retain his classified notes for delivery to his civilian counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record.

(c) With respect to the nine documents referred to in sub-section (b), *supra*, no other members of plaintiff's civilian defense team, including associate attorneys, expert consultants and potential expert witnesses, would be permitted to observe such documents or even to receive second-

hand information about their contents, with the exception of one associate attorney and one legal secretary of the civilian defense counsel.

11. Plaintiff presented his demands for unlimited access and retention of documents by himself and his civilian defense counsel, and for copies of all relevant documents and of the entire record of the first trial, to the defendant Colonel Stanley in correspondence and in pretrial arguments held pursuant to Article 39(a), UCMJ in July and September, 1973. Plaintiff and his counsel voluntarily suggested a protective order against disclosure to unauthorized persons until the public trial to which he is entitled. Colonel Stanley ruled adversely to plaintiff, stating that the defense would be required to comply with all of the above restrictions. Colonel Stanley further ruled that the Air Force was required to "clear" (using its normal standards and procedures) only one (1) associate attorney or law clerk of the civilian counsel, who is the chief defense counsel, and only one (1) secretary/typist, and that no other personnel from the civilian defense counsel's law firm or any of his potential expert witnesses or consultants may know of the "classified" information in the case. Thus, several law partners and associates of the civilian defense counsel, and several technical experts and consultants requested by the defense, are being totally denied access to relevant evidence.

12. Plaintiff sought extraordinary relief from the Court of Military Appeals to correct the restrictions upon access imposed by the defendants. Such relief was denied on September 5, 1973, *supra*.

13. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defendants pending appeal. Accordingly, in the event plaintiff is convicted and is sentenced to a period of

confinement, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial. Accordingly, unless the defendants are restrained from trying the plaintiff under the circumstances described above, the plaintiff will suffer irreparable injury.

Conclusions of Law

1. For the purposes of this motion, plaintiff has sufficiently met the requirements for a preliminary injunction as set forth in *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F. 2d 921 (D.C. Cir. 1958):

(a) Plaintiff has demonstrated the likelihood of his prevailing on the merits; specifically, that the military lacks jurisdiction to try him for alleged violations of Article 134 UCMJ and that civilian counsel is entitled to full access, subject to a protective order, to all documents relevant to the issues to be tried.

(b) Plaintiff has shown that he will suffer sufficient irreparable injury if the injunction is not issued.

(c) The issuance of this injunction will not substantially harm defendants.

(d) The public interest lies in favor of granting this injunction.

2. Plaintiff need not exhaust his military remedies as that would prove to be a futile and unjust requirement.

3. The preliminary injunction should be granted.

Barrington D. Parker,
U.S. District Judge.

Dated: November 13, 1973.

APPENDIX B

United States District Court for the District of Columbia

(Filed November 13, 1973—James F. Davey, Clerk)

RAYMOND G. DECHAMPLAIN, PLAINTIFF

v.

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., DEFENDANTS

Civil Action No. 1863-73

PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for a preliminary injunction, and the Court having considered the entire record and having heard counsel for the parties, and the Court having made and filed its findings of fact and conclusions of law, it is this 13th day of November, 1973,

ORDERED that the defendants, John L. McLucas, Secretary of the Air Force, the Chief of Staff, Department of the Air Force, The Judge Advocate General, United States Air Force, Major Forrest W. Thomas, Colonel Hewitt E. Lovelace, Jr., and Colonel Russell A. Stanley, their agents, servants, employees, and attorneys, and all persons in active concert and participation with them, be and hereby are restrained and enjoined, pending the determination of this cause, from the following actions:

(a) Requiring plaintiff to submit to a court-martial which includes charges based upon Article

134 of the Uniform Code of Military Justice, 10 U.S.C. § 934;

(b) Prosecuting plaintiff on any and all charges without granting reasonably in advance of prosecution full and unlimited access to all documents relevant and material to the case of plaintiff, his chosen civilian defense counsel and such legal associates and assistants, subject to an appropriate protective order, as are necessary to said counsel's adequate preparation for trial. Such access is to include delivery to civilian defense counsel of a copy of the entire record of the proceedings at plaintiff's first court-martial and the documents upon which the present charges are based.

In the exercise of its discretion the Court will not require plaintiff to post security.

BARRINGTON D. PARKER,
U. S. District Judge.

November 13, 1973.

APPENDIX C

United States District Court for the District of Columbia

(Filed December 12, 1973)

RAYMOND G. DECHAMPLAIN, *Plaintiff*

v.

JOHN L. MCLUCAS, SECRETARY OF THE AIR FORCE, ET AL., *Defendants*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN this 12th day of December, 1973, that defendants hereby appeal to the Supreme Court of the United States from the judgment of this Court entered on the 13th day of November, 1973 in favor of plaintiff against said defendants, granting plaintiff's motion for preliminary injunction.

This appeal is taken pursuant to Title 28, United States Code, section 1252.

(S) Michael A. Katz,
MICHAEL A. KATZ,
Assistant U.S. Attorney.

APPENDIX D

181946Z Dec 73.

CSAF Wash, DC
1840ABWG Richards—Gebaur AFB, Mo
Info USAF Trial Judiciary Fourth Circuit, Lowry AFB CO
LAFCS Richards—Gebaur AFB, Mo
DCASR DCRN–1 New York, New York
Unclas JAJM
For JA. Subject: Access to classified material for civilian defense counsel in general court-martial of *U.S. v. MSGT Raymond G. DeChamplain*. This message is in four parts.

Part I: Reference our 061813Z Sep 73 and 051902Z Oct 73 messages, same subject.

Part II: Authority is hereby granted to permit access by the individuals named in Part III below to the classified documents and material described in both above referenced messages. Access will be subject to the same conditions contained in Part IV of the above referenced CSAF/JAJM message 061813Z Sep 73.

Part III: Authorization to permit access to the documents and classified material referenced in Part II above is granted to the following individuals:
(A) Mr. William G. Florence, SSAN, 263–74–0440;
(B) Professor Richard Falk, SSAN 573–38–9522.

Part IV: This access has been granted to the above named individuals in order that they may be available to assist the defense team as consultant experts in sub-

ject case. Their subsequent participation in the court-martial trial of this case, such as appearing as witnesses, is a matter to be resolved by the trial court. Please insure that civilian defense counsel is appropriately notified of contents hereof.

James J. Blommers, Capt, JAJM, 35770/18 Dec 73/LA

Paul W. Buehler, Col, Asst Chief, JAJM

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